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Request for the inclusion of an item in the provisional agenda of the seventy-third session

Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials

Letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General

On behalf of the African States Members of the United Nations, I have the honour to request, in accordance with rule 13 of the rules of procedure of the General Assembly, the inclusion of an item entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials", in the provisional agenda of the seventy-third session of the General Assembly under heading F, Promotion of justice and international law. I further request that this item be considered directly in plenary meeting.

In conformity with rule 20 of the rules of procedure of the General Assembly, an explanatory memorandum is attached to the present letter (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly.

(*Signed*) Lazarus Ombai **Amayo**
Ambassador
Permanent Representative of
the Republic of Kenya to the United Nations and
Chair of the African Group for July

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Annex

Explanatory memorandum

1. The African States Members of the United Nations seek the inclusion of an agenda item on the agenda of the seventy-third session of the General Assembly, entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials".

Background

2. The legal obligations of the States Members of the United Nations are derived from, inter alia, the Charter, multilateral treaties, bilateral agreements and customary international law. Part of the latter is the immunities of Heads of State, a member of a Government or parliament, an elected representative or a government official.[1] In recent years, the issue of immunities has become one of the most pressing issues in international law, with countless academic articles offering differing legal conclusions, not helped by conflicting decisions of the Pre-Trial Chambers of the International Criminal Court.

3. The issue is of crucial concern to States Members of the United Nations and was raised extensively in General Assembly debates on the matter. In the case of a Security Council referral to the International Criminal Court, Members of the General Assembly are faced with "competing obligations" derived from the Charter, the Rome Statute, customary international law or even internal legislation with respect to immunities of Heads of State, a member of a Government or parliament, an elected representative or a government official.

4. Pre-Trial Chamber I of the International Criminal Court, while considering such situations, in the case of whether Malawi and Chad had been non-compliant in failing to arrest President Al-Bashir, found that "the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not parties to the Statute whenever the Court may exercise jurisdiction".[2]

5. In a subsequent consideration, Pre-Trial Chamber II took a different interpretive approach, recognizing that there could be instances where the issue of personal immunities of Heads of State of a non-State party may justifiably be raised before the Court and that "the solution provided for in the Statute to resolve such conflicts is found in article 98 (1) of the Statute".[3]

6. In addition, in the more recent decision of Pre-Trial Chamber II in the case of South Africa, yet another line of interpretation was adopted. According to the Chamber, "since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27 (2) of the Statute, in its plain meaning, also encompasses that immunity".[4] Furthermore, that if States parties were to rely on immunities to refuse cooperation, it would make the Court's role overwhelmingly difficult and that would be contrary to the purpose and object of article 27 (2).[5] Judge Marc Perrin de Brichambaut of the Court, in a separate opinion,

[1] Art. 27 of the Rome Statute.
[2] ICC-02/05-01/09-139-Corr., para. 36.
[3] ICC-02/05-01/09-195, para. 27.
[4] ICC-02/05-01/09-302, para. 74.
[5] ICC-02/05-01/09-302, para. 75.

indicated that the current state of international law is not clear enough to make "firm conclusions" pertaining to whether (a) a Security Council referral would make a non-State party analogous to a State party, making inapplicable article 98 (1) of the Statute; (b) Al-Bashir's immunity was removed by way of Security Council resolution 1593 (2005); and (c) international courts can affect the application of the customary international rule of personal immunities as it applies among States.[6] The Judge further remarked that it would have been an appropriate course of action to request an advisory opinion of the International Court of Justice on some of the bewildering international law issues.[7]

7. The advisory opinion required from the International Court of Justice on different legal and factual issues is a Charter requirement. The Rome Statute of the International Criminal Court has sought the same identical approach in its article 119 (2), thereby acknowledging the incidence of such a situation and reasserting its objectivity.

8. In pursuit of the proper application and understanding of international law, African States support international efforts to strengthen international criminal justice. It is in this connection that the African Union Assembly decided to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other senior officials.[8]

9. Accordingly, African States Members of the United Nations, in accordance with rule 13 of the rules of procedure of the General Assembly, request the inclusion of an item entitled "Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials" in the provisional agenda of the seventy-third session of the General Assembly under heading F, Promotion of justice and international law.

The benefit of an advisory opinion

10. Members of the United Nations will benefit from a General Assembly request for an advisory opinion of the International Court of Justice that will provide clarity to the evident ambiguity and to competing obligations under international law and will assist States in carrying out their obligations without undermining either the call for ending impunity or the legal regime governing the immunities of Heads of State and Government and other senior officials.

11. By having recourse to the International Court of Justice, as the principal judicial organ of the United Nations, the General Assembly would also underscore its resolve to give effect to the mission entrusted to it by the Members of the United Nations to ensure the appropriate implementation of international legal norms within the work of the United Nations and its Member States.

12. The divergence of States' practices and relying on their own interpretation rather than recourse to available international justice mechanisms thereby undermine the international justice system and the legal regime governing relations between States in its entirety.

13. By seeking the advisory opinion in the exercise of its powers under Article 96 (1) of the Charter, the General Assembly will be able to bring a lasting resolution to the long-disputed issue of immunities and the conflicting obligations of States under international law.

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[6] ICC-02/05-01/09-302-Anx, para. 99.

[7] ICC-02/05-01/09-302-Anx, para. 97.

[8] Assembly/AU/Dec.672 (XXX), para. 5 (ii).